

**VIRGINIA CODE COMMISSION**

***Monday, December 5, 2011 - 10:00 a.m.***

*General Assembly Building, 6th Floor*

*Speaker's Conference Room*

*Richmond, Virginia 23219*

**MEMBERS PRESENT:** John S. Edwards; Jim LeMunyon; Charles S. Sharp; Patricia West; Robert L. Calhoun; Thomas M. Moncure, Jr.; E.M. Miller, Jr.; Jeffrey S. Palmore; Wesley G. Russell, Jr.; Robert L. Tavenner

**MEMBERS ABSENT:** Bill Janis, Ryan McDougale

**OTHERS PRESENT:** Katya Herndon, Professor Kent Sinclair, Jay Spruill, Brian Kennedy

**STAFF PRESENT:** David Cotter, Jane Chaffin, Karen Perrine, Lisa Wallmeyer, Alan Wambold, Mindy Tanner

**Call to order; minutes**

Senator Edwards called the meeting to order at 10:10 a.m. and called for a moment of silence to honor the memory of long-serving Commission member Frank Ferguson.

The Commission approved the minutes of the October 3, 2011, meeting upon a motion made by Delegate LeMunyon and seconded by Judge Sharp.

**Administrative Law Advisory Committee: annual report and member appointments**

Chris Nolen, Chair of the Administrative Law Advisory Committee (ALAC), updated the members on the status of ALAC studies that were conducted during the year.

Mr. Nolen reported that ALAC spent the summer and fall reviewing the Model Administrative Procedures Act (APA) adopted in 2010 by the Uniform Law Commission. ALAC divided into two workgroups to compare the model and Virginia's regulatory process. The Judicial Workgroup debated Virginia's process for hearing officers and will continue its work in the spring. As an aside, Mr. Nolen advised that the Supreme Court's Hearing Officer Handbook needs revision, and ALAC has agreed to work on the revision with the Supreme Court. ALAC assisted in the revision a couple of years ago as well.

Mr. Nolen stated that the Regulatory Workgroup observed that the mandated annual filing of state agencies guidance document lists would be greatly improved if hyperlinks to the guidance documents were included in the list. The Registrar of Regulations is addressing this matter in the filing guidelines. Mr. Nolen stated that a clear policy is needed on the issue dealing with incorporation by reference, and ALAC will continue to study the issue and report back to the Commission.

At the conclusion of his report, Mr. Nolen presented a proposed slate of ALAC appointment recommendations to the Commission for consideration. The slate, which is attached and made a part of these minutes, consists of mostly reappointments with the exception of Brooks Smith, a partner at Hunton & Williams, who is the current Chair of the Virginia Bar Association Administrative Law Section. Mr. Moncure made a motion, seconded by Mr. Miller, to appoint the slate of nominees as presented. The motion was approved.

1 The Commission discussed the judicial review process provisions of the Administrative  
2 Process Act, which give judges little ability to overturn administrative decisions. The  
3 Commission concluded that amendments clarifying the current process might be  
4 sufficient to remedy the problem.

5 **Code of Virginia Notice Delivery Provisions**

6 Lisa Wallmeyer summarized the issues discussed at a previous meeting related to Code  
7 provisions requiring delivery of notices by the U.S. postal service and determining if  
8 commercial delivery service is a viable option. The remaining question was whether  
9 delivery by commercial delivery service would in every case be equivalent to delivery via  
10 U.S. mail. Since the September meeting, Ms. Wallmeyer identified over 1,500 provisions  
11 referencing mail, sending of notice, etc.

12 Two general types of notices were discovered during the review. The first type is notice  
13 required to be given by a public body, and the other is notice required to be provided by  
14 citizens or private entities. While some provisions require notice to be sent by certified  
15 mail requiring a return receipt, other provisions require that notice be sent via first class  
16 mail. Many references are generic and only state that an entity must mail notice.

17 The Commission discussed the different types of commercial and private delivery  
18 services and potential legal issues involved if someone is required to retain proof of  
19 delivery, but the service uses electronic tracking and does not provide return receipt  
20 service.

21 At the conclusion of the discussion, the Commission decided to continue working on this  
22 issue over the next year. Ms. Wallmeyer stated that she would develop a work plan so  
23 that the Commission can work systematically through all references and explore the  
24 various issues.

25 **Virginia Rules of Evidence**

26 At the Commission's October meeting, Professor Kent Sinclair presented proposed Rules  
27 of Evidence as approved by the Supreme Court of Virginia on September 12, 2011. In  
28 addition, staff presented draft legislation to codify the rules. At the conclusion of the  
29 October presentation, the Commission decided to solicit comments on the Rules of  
30 Evidence and draft legislation by disseminating the information to a wide variety of  
31 attorney organizations. On October 18, 2011, notice was sent out by email and the  
32 proposed Rules of Evidence, draft legislation, and associated documents were  
33 prominently posted on the Commission's website. Comments were received from three  
34 individuals. Two commenters endorsed the rules, and one commenter thought the expert  
35 rule did not go far enough in federalizing the Virginia rules.

36 David Cotter summarized the draft legislation. The proposed bill (i) repeals numerous  
37 Code sections, the substance of which is incorporated into the Rules of Evidence; (ii)  
38 reflects the Commission's approval as required by §§ 8.01-3 and 30-153; (iii) eliminates  
39 any further oversight of the Rules of Evidence by the Commission or the General  
40 Assembly by repealing §§ 8.01-3 and 30-153; (iv) provides that the Rules of Evidence  
41 will become effective on July 1, 2012; (v) provides that the Rules of Evidence will  
42 govern all proceedings held on or after the effective date, including pending cases; and

(vi) emphasizes that provisions of the Code control over the rules in the event of a conflict between the two.

Mr. Cotter explained that the only procedural change is repealing the authority of the Commission over the Rules of Evidence. Although this is a substantive change, Mr. Cotter stressed that the General Assembly has the ability to override a rule.

The Commission discussed the proposal that would allow the Supreme Court to change evidence rules without General Assembly approval. Under § 8.01-3, future evidence rule changes will become effective 60 days from Supreme Court adoption; however, the General Assembly must wait until it goes into Session to take action if it disagrees with an adopted rule.

In response to an inquiry concerning whether the bill repeals all evidence rules in the Code, Professor Sinclair replied that two statutory rules--§§ 8.01-397 ("Deadman's" statute) and 8.01-399 (Physician-Patient Privilege statute)--are retained in the Code, but only cross referenced in the new rules. The basis for the decision to retain these rules in the statute is due to the frequent amendment of § 8.01-399 by the legislature and the contentious nature of § 8.01-397. The remaining statutory rules of evidence have been moved into the new rules verbatim.

Judge West conveyed her preference for all of the Rules of Evidence, including §§ 8.01-397 and 8.01-399, to be housed in one place. Katya Herndon agreed to approach the Chief Justice to see if the Supreme Court is willing to reprint these statutes in the rules.

Mr. Miller made a motion to approve the Rules of Evidence submitted by the Supreme Court according to § 30-153 with the caveat that the Supreme Court incorporate the text of §§ 8.01-397 and 8.01-399 into the rules. Senator Calhoun seconded the motion. The Commission acknowledged that it is relying on the assurance of the Supreme Court and the Boyd-Graves Conference that the rules pending approval do not contain substantive changes in or inconsistencies with Virginia law or case law. Mr. Miller's motion was approved.

Responding to Senator Calhoun's question about the plans of the Supreme Court to send the Executive Secretary or another spokesperson to the legislative committee to make a strong statement in support of the bill, Ms. Herndon stated that Professor Sinclair would be speaking to the bill on behalf of Supreme Court.

Judge Sharp made a motion, seconded by Judge West, for the Code Commission to present the legislation to codify the Rules of Evidence to the 2012 General Assembly. The motion was approved. Senator Edwards will introduce the bill.

#### **Title 64.2 recodification**

David Cotter presented proposed Chapter 1, Definitions and General Provisions, which incorporates definitions having general applicability from various sections throughout the Title 64.2 and combines them in one article. However, in those instances where a chapter, article, or section defines a term in a unique manner, that definition is retained for use in that chapter, article, or section. Most of the information has been previously reviewed by the Commission while in its former locations. Senator Calhoun asked Mr. Cotter to

1 explain why the definition of "trustee" found in § 64.2-106 is limited to that section  
2 instead of being moved to the general definitions section (§ 64.2-100). Mr. Cotter  
3 explained that the work group expressed a concern with including "trustee" in the general  
4 definitions section because the term is defined in the Uniform Trust Code. It was noted  
5 that the term "personal representative" in § 64.2-106 A is unnecessary because the term is  
6 defined in § 64.2-107 (existing § 64.1-57.2). Senator Calhoun made a motion, seconded  
7 by Judge West, to delete the definition of "personal representative" from § 64.2-106 and  
8 move the remaining definition of "trustee" from § 64.2-106 to the general definitions  
9 section. The motion was approved.

10 Mr. Cotter addressed several outstanding issues that were revisited by the work group and  
11 noted that the majority of the amendments are technical or clarifying in nature. He  
12 specifically highlighted §§ 64.2-308 and 64.2-422:

- 13 • § 64.2-308 - At a previous meeting, the Commission voted to remove language at the  
14 end of subsection B after "intestate succession" as no one could explain what the  
15 provision really means.

16 *B. If a parent willfully deserts or abandons his ~~or her~~ minor or incapacitated child and such*  
17 *desertion or abandonment continues until the death of the child, the parent shall be barred of all*  
18 *interest in the child's estate by intestate succession ~~unless the parent resumes the parental~~*  
19 *~~relationship and duties and such parental relationship and duties continue until the death of the~~*  
20 *~~child.~~"*

21 Mr. Cotter stated that he shared the Commission's decision with the work group, and  
22 many work group members were uneasy with removing the language, but could not  
23 give a sound reason for retaining the language. The Commission did not reverse its  
24 decision.

- 25 • § 64.2-422 - The reference to the Premarital Agreement Act is eliminated so as to  
26 allow valid premarital or marital agreements executed outside the Commonwealth to  
27 be given effect. When this section was first presented to the Commission, a motion  
28 passed to retain the reference to the Premarital Agreement Act. The work group  
29 prefers the original version and requests the Commission to reconsider its decision.  
30 Mr. Miller made a motion to strike the reference to the Premarital Agreement Act.  
31 Mr. Russell seconded the motion, and the motion was approved.

32 Mr. Cotter informed the Commission that the remaining actions to be taken by the  
33 Commission in order to complete the recodification process are to review the proposed  
34 enactment clauses to the Title 64.1 recodification bill and approve the final report.

35 Mr. Cotter distributed the proposed enactment clauses, most of which are standard  
36 enactments in recodification legislation. He pointed out the savings clause enactments for  
37 provisions in § 64.1-55, relating to the validation of holographic wills admitted to probate  
38 prior to March 20, 1922, and § 26-57, relating to the validation of certain substitute  
39 trustees appointed prior to July 27, 1942. The bill will remove the two sections from the  
40 Code, but the provisions will continue in effect through the enactments in the event that  
41 the provisions might still apply to someone.

Upon completion of Mr. Cotter's presentation, Senator Calhoun moved the adoption of the final report of the recodification of Title 64.1. Mr. Tavenner seconded the motion, and the motion was approved. Mr. Miller asked staff to have a copy of the final report bound for Mr. Cotter with his name embossed on the cover.

**2012 Code of Virginia pricing and replacement volume proposal**

Brian Kennedy, Associate Director for Government Content Acquisition, LexisNexis, presented the 2012 Code of Virginia proposed replacement volume options and pricing proposal for the replacements and supplements. The proposal has two pricing options based on the replacement of four or five volumes. Mr. Kennedy noted that the Commission replaced six volumes in 2011. The total package price is less than the 2011 package price because the number of proposed volumes is less than last year.

Based on supplement size, Mr. Kennedy recommended replacing Volumes 2B (Titles 9.1-10.1), 3A (Title 15.2), and 8 (Titles 55-57). In addition, he recommends replacing Volume 9A (Titles 63.2-67), which will contain recodified Title 64.2. A price increase of 3.8% is proposed for state agency purchases and a 3.5% increase is proposed for private purchases.

The Commission approved Senator Calhoun's motion, which was seconded by Mr. Moncure, to accept the Lexis proposal to replace Volumes 2B, 3A, 8 and 9A with the replacement of Volume 9A being predicated upon the passage of the recodification legislation, and to approve the Lexis pricing proposal as follows:

	2012 Prices with Four Replacement Volumes	
	State	Private
Cumulative Supplements	\$176.50	\$234.50
Index	\$ 74.50	\$ 79.00
Replacement Volumes 2B, 3A, 8, 9A	\$160.00 (\$40 each)	\$200.00 (\$50 each)
Volume 11	\$ 30.50	\$ 40.00
Volume 11 Supplement	\$ 10.00	\$ 10.00
Advanced Code Service		\$ 57.50
TOTAL	\$451.50	\$621.50

**Title 33.1 recodification: preliminary questions**

Alan Wambold introduced himself and Nicole Brenner, members of the Division of Legislative Services' transportation team who will be staffing the Title 33.1 (Highways, Bridges and Ferries) recodification study. Mr. Wambold approached the Commission for its guidance on a couple of issues. His main question concerns several chapters in Title 15.2 that deal with multi-jurisdictional transportation authorities and compacts and three chapters in Title 56 that also deal with transportation-related issues. Mr. Wambold inquired as to whether the Commission prefers moving all of these provisions into Title 33.2. General guidance given to staff by the Commission was to move these types of provisions into Title 33.2 and to review related uncodified provisions.

Mr. Miller suggested that staff proceed with the recodification as usual, including (i) submission of a general outline of the proposed organization of Title 33.2, including

1 which provisions should move from other titles into Title 33.2 and which provisions  
2 should move out of Title 33.1 into other titles and (ii) establishment of a task force of  
3 interested groups, including affected state agencies such as the Department of  
4 Transportation and Department of Rail and Public Transportation, to work with  
5 Legislative Services staff on the recodification. Mr. Miller stressed the importance of  
6 involving interested groups throughout the recodification process so that no unexpected  
7 surprises arise at the last minute.

8 Senator Calhoun made a motion, seconded by Mr. Russell, for staff to proceed as  
9 suggested by Mr. Miller. The motion was approved.

10 **Obsolete laws report (required by § 30-151)**

11 Mindy Tanner presented two chapters in Title 36 with a recommendation that they be  
12 repealed. Chapters 2 (§ 36-56 et seq.) and 3 (§ 36-65 et seq.), created in 1942 and 1946  
13 respectively, address housing shortages for defense industry workers and World War II  
14 veterans that existed during and after World War II. Housing authorities could not initiate  
15 new projects after December 31, 1946 (Chapter 2), and March 1, 1948 (Chapter 3). It  
16 appears that no projects related to these chapters continue to exist. Ms. Tanner indicated  
17 that she consulted with the Virginia Housing Commission, Virginia Housing  
18 Development Authority, Department of Housing and Community Development,  
19 Department of Veterans Services, Virginia Association of Counties, and Virginia  
20 Municipal League, and these agencies and organizations had no objection to repealing  
21 these chapters.

22 Judge Sharp made a motion, seconded by Mr. Miller, to approve the recommendation to  
23 repeal Chapters 2 and 3 of Title 36. Judge West mentioned the recent incident at Fort  
24 Monroe concerning a mold issue and wants to be sure the Commission's action will not  
25 take away any remedy to the problem. Delegate LeMunyon made a substitute motion,  
26 seconded by Mr. Moncure, to approve the recommendation to repeal Chapters 2 and 3 of  
27 Title 36, subject to there being no objections from veterans' organizations. The motion  
28 was approved. Delegate LeMunyon agreed to carry the legislation repealing these  
29 chapters.

30 **Other business; public comment; adjournment**

31 The Chair opened the floor for public comment. As there was no public comment and no  
32 further business to discuss, the meeting adjourned at 12:20 p.m.